

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 187 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed : YES
to see the judgements? Yes

2. To be referred to the Reporter or not? No :

3. Whether Their Lordships wish to see the fair copy : NO
of the judgement? No

4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? : NO
No

RADHAKRISHNA CHIMANBHAI PATEL

Versus

MAHENDRABHAI DAYARAM MAHANT

Appearance:

MR DILIP B RANA for Petitioners

MR HM PARIKH for Respondent No. 1

CORAM : MR.JUSTICE D.P.BUCH

Date of decision: 16/06/2000

CAV JUDGEMENT

Present Revision Application under Section 115 of
the Code of Civil Procedure 1908 has been filed by the
petitioners above-named, challenging the orders passed
below Exhibit-53 and 57 by the learned 2nd Jt. Civil

Judge (S.D.) at Nadidad in Special Civil Suit No. 143 of 1996.

2. It appears that, in the aforesaid civil suit the respondents above-named submitted an application saying that the suit land has been obtained as 'Mortgage With Possession' by the plaintiff from the defendants. That, therefore the plaintiff is the tenant in respect of the said property and such plea has been raised as an alternative plea. That an issue has been framed being Issue No.4 and therefore the said issue no.4 be referred to the tenancy Court for adjudication.

3. The trial Court heard the parties and passed an order dated 11th February 2000. At the same time the defendants being the petitioners in the present Revision Application preferred an application Exhibit-57, saying that this is a matter of mortgage with possession and there is no question of tenancy right or tenancy issue in said matter, and therefore, the issue framed with respect to the tenancy of the plaintiff be deleted. The said application was presented on 30th November 1999.

4. It appears that the trial Court heard the application Exhibit-53 as well as application Exhibit-57 together and passed a common order below the said two applications on 11th February 2000. By the aforesaid order, the trial Court allowed the application of the original plaintiff being Exhibit-53 and directed that the Issue No.4 regarding the Tenancy be referred to the Tenancy Court for deciding the same. At the same time the trial Court dismissed the application Exhibit-57 of the ori. defendants for deleting the said issue.

5. Feeling aggrieved by the said order of the lower Court the petitioners have preferred this Revision Application before this Court.

6. It has been mainly contended before this Court that the parties had entered into a contract of mortgage with possession and under the law a mortgagee with possession is never treated to be the tenancy under Bombay Tenancy & Agricultural Lands Act 1948, and therefore it was not necessary to raise the issue of tenancy and also not necessary to refer the matter to the Tenancy Court. Therefore the trial Court has committed jurisdictional error in not deleting the issue of tenancy and in referring the said issue to the Tenancy Court. Therefore the said order has been brought to challenge before this Court by way of present Revision Application.

7. Rule was issued. The respondent has appeared before the Court and arguments have been advanced on behalf of the respondent. I have also heard learned advocate for the petitioners and also perused the papers.

8. Now, there is a document placed at page-11 saying that the property in question has been under a 'contract of mortgage with possession'. The dispute seems to be that the land is mortgaged with possession and there is no question of tenancy. For ready reference the petitioner has referred to Section 4 of the said Act in para-3.9 at page-F to the petition, which reads as under:-

" 4. PERSONS TO BE DEEMED TENANTS:

" A person lawfully cultivating any land belonging to another person shall be deemed to be a tenant if such land is not cultivated personally by the owner and if such person is not, -

(a) a member of the owner's family , or

(b) a servant on wages payable in cash or kind but not in crops hire or hired labourer cultivating the land under the personal supervision of the owner of any member of the owner's family, or

(c) a mortgagee in possession. "

9. On the basis of the aforesaid section, learned advocate for the petitioners vehemently argued that the 'mortgage with possession' is not a dispute and therefore, there is no issue of tenancy and said issue cannot be referred to Tenancy Court for decision, and therefore the trial Court ought to have decided the issue of mortgage with possession only and ought not to have referred it to the tenancy Court for deciding Issue No.4 in respect of tenancy right.

10. Learned advocate for the petitioners further argued that the 'mortgagee with possession' cannot be treated as tenant in view of Section 4 of the said Act referred to hereinabove. Even if this Court takes the aforesaid argument is acceptable, then also it is a fact that the plea of the original plaintiff by way of alternative plea is that, he is the tenant of the defendants. The issues are framed by the trial Court

considering the pleadings and the reliefs claimed. The ori. plaintiff being the respondent in the present revision application has come by way of an alternative plea that he is the tenant and he be declared as a tenant of the suit land. It is well settled that the issues are required to be framed with respect to the main relief as well as the alternative relief claimed in the plaint. In the present case, alternative relief of tenancy has been claimed right from the beginning. Therefore that issue has to be framed by the trial Court. Moreover, said issue has been framed and referred to the Tanancy Court, since the said issue cannot be decided by the Civil Court in view of the provisions contained in the said Act.

11. Under the aforesaid circumstances it cannot be said that the order of the trial Court framing the issue of tenancy, and referring the said issue for decision by the Tenancy Court is illegal and without jurisdiction.

12. It would be open to the present petitioners - the original defendants to argue before the Tenancy Court that since it is a contract/transaction of 'mortgage with possession', the mortgagee in possession could not claim tenancy right and therefore it should be held by the Tenancy Court that the ori. plaintiff- respondent herein is not a tenant of the ori. defendants - petitioners and the said plea of the present respondent be turned down by the Tenancy Court. The petitioners can very well raise said plea before the Tenancy Court and obtain appropriate decision. It would also be open to the petitioners to raise this issue as a preliminary issue and request the Tenancy Court to decide the said issue on the strength of the documents in question.

13. In the aforesaid view of the matter no prejudice has been caused to the petitioners on the strength of the order of the executing Court. This is a Revisional Court. The jurisdiction and powers of the revisional Court are very limited. Even if the order is right or wrong, it would not be proper or possible for this Court to interfere with such order unless it is shown that the said order has resulted in to failure of justice or miscarriage of justice. In the present case it is not shown that there is failure of justice or miscarriage of justice. In fact as said above, the issue can be settled and adjudicated before the tenancy Court by expediting the hearing and disposal of the said matter before the tenancy Court.

14. Some decisions have been shown by learned advocate for the petitioner. The first is in case of

M/s. NILESH CONSTRUCTION COMPANY AND ANOTHER V. MRS. GANGUBAI AND OTHERS, reported in AIR 1982, Bombay, 421. There it has been observed that the issue of tenancy cannot be raised on vague plea. Here the facts are different. The respondent has prayed for the specific relief for a declaration that he is a tenant in respect of the suit property. Therefore the plea cannot be treated to be vague. It is more so when the trial Court has found the pleading to be sufficient for raising an issue. The pleading of the Mofussil Court is not to be strictly construed. When specific relief has been claimed and therefore the issue has been framed, it has to be heard and adjudicated by the tenancy Court.

15. In KANJI KURJI V. KALAL GOPAL, reported in 1957 BLR, 846, it has been held that " a mortgagee in possession" in Sec. 4 (e) of the Bombay Tenancy and Agricultural Lands Act, 1948, include within its scope all persons who derive title under a mortgagee in possession, and, therefore, a tenant from a mortgagee in possession, who derives title through him, cannot acquire the status of a deemed tenant or a statutory tenant under the Act. I think the present petitioners can raise this plea and show this decision to the tenancy Court if it is so necessary. However now the issue has been framed, there is no question of deleting the same.

16. On the other hand in BABAR SOMLA KAMLI V. GANPAT NARAYAN MOHITE, reported in AIR 1970, (Guj.) 148, it has been laid down by this Court that, when the issue has been framed and found to be triable by the tenancy Court, it cannot be deleted, but it must be referred to the tenancy Court. It is exactly what has been done by the trial Court.

17. Almost a similar view has been taken in GANDAJI SATWAJI SHINDE V. RAMCHANDRA BHIKAIJI JOSHI, reported in AIR 1979, S.C. 653, as well as in JOSHI CHHAGANLAL GARBADDAS (DECD) THROUGH HIS HEIRS VISHNUPRASAD AND ORS V. RAISING KHODASING AND ORS, reported in 1996 (1) GLR, 69. This decision further goes to show that the Court cannot insist that let the party first establish a *prima facie* case in support of his plea. It also says that, raising of dispute would be sufficient and it is not necessary that there should be a *prima facie* proof of the aforesaid allegation.

18. In aforesaid view of the matter, it is quite clear that, in the present case an issue has been raised by the original plaintiff and the relief has been claimed on the strength of the said plea. The issue has been

framed by the trial Court and it has been referred to the tenancy Court. It is quite according to law and therefore the said order cannot be said to be illegal and without jurisdiction. As said above the aforesaid order has not resulted in to miscarriage of justice and therefore, it is not proper or possible for this Court to interfere with the said order. Consequently there is no merit in the Revision Application and it deserves to be dismissed. This Revision Application is accordingly dismissed. Rule stands discharged. Ad interim relief granted earlier shall stand vacated. No order as to costs.

Dt: 16-06-2000

(D.P. Buch, J)

/vgn

Further Order:-

After the pronouncement of the aforesaid judgment, learned advocate for the petitioners seeks time to approach the Honourable Supreme Court, for eight weeks. Operation of the judgment of this Court as aforesaid, is suspended for a period of eight weeks from today.

Dt: 16-06-2000

(D.P. Buch, J)